

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 573 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

DHIRAJLAL MADHAVLAL BHARATI

Versus

MUNICIPAL COMMISSIONER

Appearance:

PARTY-IN-PERSON for Petitioner

RULE SERVED for Respondent No. 1

MR RM CHHAYA for Respondent No. 4

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 22/09/1999

ORAL JUDGEMENT

1. The case has a checkered history. The relief to which petitioner claims in this petition is to direct the respondent municipal corporation to fix the pension and gratuity of the petitioner as per Circular of the Pension & Gratuity of the Chief Accounts Department, Ahmedabad Municipal Corporation from 1/1/1988 and give him that amount within a period of two months from the date of

receipt of writ of this Court and to pay all the due arrears with interest of 12% with effect from 1/1/1988 to the date of payment of those dues. This is the second time the petitioner has come before this Court for the same relief.

2. As it will presently be noticed the claim of the petitioner is founded on the premise that he has superannuated from the services on 31/12/1987 on completion of 30 years of service with pension and gratuity under the rules governing the retiral benefits of the employees of the corporation, but the same has not been paid to him on that basis. As a matter of fact, no pension has been paid to the petitioner. According to the case of the petitioner, he was first appointed on 15/7/1954 as tracer in the Estate Department of the respondent corporation from which post he was discharged on 9/2/1955 there being no post available. Again he was appointed on 26/6/1955 in the Estate Department as Tracer and worked thereon upto 18/2/1957 and by order dated 19/2/1957, he was appointed on deputation in the establishment of Town Planning. Since the petitioners appointment on deputation to the Town Planning Establishment with effect from 22/2/1957, the chronology of the petitioner's service graph has been detailed in the judgement of Supreme Court in petitioner's own case since reported in AIR 1991 SC 940 which has relevant bearing in the present case concerning his reversion from deputation to the parent department, namely establishment of the municipal corporation by order dated 30th September 1976 as Tracer which order the petitioner never complied with. Between the date of deputation to the town planning establishment and to the date of reversion to the establishment of the corporation by order dated 30th September 1976, the petitioner was once removed from service as a result of some private quarrel in 1964 which again was first approved by the Industrial Tribunal, but later on being remanded by this Court, the approval was withheld, consequently the order of termination passed in 1964 became abortive. Again, the petitioner was retrenched in 1967 and was given reappointment during the pendency of the proceedings concerning his removal from service in 1964 and as the petitioner continued in services as a result of the failure of termination order of 1964, the petitioner continued to be in service as on deputation until 30th September 1976 in the town planning department. The petitioner had been promoted to the post of junior drafts man in the town planning department while he was on deputation. On repatriation to the parent department, the petitioner was posted as he there was on original post from which he was sent on

deputation. The petitioner challenged that action and claimed right to hold the post of junior draftsman in the corporation, the post to which he has been promoted in the town planning establishment. Having failed in appeal before the standing committee on 15/3/1977, the petitioner preferred a writ petition before this Court which was rejected firstly by learned Single Judge of this Court then also in Letters Patent Appeal on 24/7/1978. The petitioner carried the matter upto the Supreme Court. The petitioner had attained the age of superannuation during the pendency of appeal before the Supreme Court. The petitioner failed in appeal and the order dated 30th September 1976 repatriating the petitioner to the parent department, namely the establishment of the corporation as Tracer was upheld. While rejecting the appeal, the Supreme Court noticed the contention of the corporation consequence of which was not decided as under :-

"Learned counsel for the Municipal Corporation

submitted to us that the appellant had not joined his post as a tracer in compliance with the order dated 30/9/1976 and that by now he has also reached the age of superannuation. We are not here concerned in this appeal with the consequences of 'noncompliance' of the order dated 30/9/76 by the appellant. We are only concerned with the question whether the appellant was rightly appointed as a tracer on his reverter to the Municipal Corporation and that question we have answered in the affirmative. We do not express any opinion on the questions raised by the learned counsel for the respondents."

3. Thus, the observations suggest that there being no dispute about the non-joining of the duties in pursuance of the order dated 30/9/76, which was operative through out the period, but consequence of which it will carry was not decided by the Supreme Court. Thus, the fact which even now remains undisputed that the petitioner was reverted to the post of tracer in his parent department by order dated 30/9/76 and he never joined in compliance thereof in his parent department. During this period, the petitioner sought permission of the Corporation to be enrolled as an Advocate at the Bar Council by his letter dated 18/2/1985 and 12/6/1985. The corporation by letter dated 4/3/1985 made it clear to the petitioner that if he treats himself as having ceased to be a municipal employee, he had the right to start practice as a lawyer. The same stand was repeated by the

corporation vide letter dated 9th June 1985. The petitioner as a matter of fact got himself enrolled in June 1985 and since then, he is a practising member of the Bar.

4. The petitioner filed Special Civil Application No. 2116/88 for directing the respondents to make a part payment of Rs.50,000/- with interest from the due date of retirement to the date of receipt of the said amount. This relief appears to be a demand in part payment of the retiral benefits. Thereafter, the petitioner filed Special Civil Application NO. 5139/93 for mandamus to the respondents for releasing the retiral benefits. Both the above petitions were dismissed by the learned Single Judge of this Court on 3/3/1997. The petitions were dismissed after taking note of the checkered history of the case, mainly on the ground of his conduct in not obeying the orders dated 30th September 1976 and remaining absent from duty unauthorisedly which disentitle him to relief in exercise of extra ordinary jurisdiction under Article 226 of the Constitution. The petitioner filed LPA only against the order made in Special Civil Application No. 5139/93. The Division Bench of this Court was of the view that though the petitioner cannot make any grievance against reversion and that inspite of the order passed by the appellate authority, the appellant did not resume duty and that Supreme Court did not expressed any opinion on the question raised on behalf of the corporation about the absence from duty of the petitioner and consequences thereof, held that 'the learned Single Judge was not right in dismissing the petition observing that the petitioner was taking undue advantage and in exercise of extra ordinary powers of Article 226, the conduct of the appellant disentitled him from getting any relief'. The Court further made it clear that the court cannot hold that the appellant is entitled to any benefits. The Court further observed the only direction which can be issued is to order the respondent corporation to consider the case of appellant in the light of all attendant circumstances and in accordance with law. The order of costs awarded by the learned Single Judge was also set aside.

As a result of the aforesaid order, the time limit was fixed for the respondent corporation to consider the case of the petitioner put forward before the corporation in accordance with law. As the order could not be complied with within the time allowed, the contempt application was also filed to seek direction that the respondents be given retirement benefits

including the benefit of pension with current rate of interest of 15% from the date of his retirement. While the Court declined the prayer once again to grant the mandamus in favour of the petitioner, but extended the period of deciding the claim of the petitioner upto 16/4/1998. It appears that thereafter ultimately the claim of the petitioner was decided by the impugned order dated 12/11/1998, by which the retiral claim of the petitioner was computed with leave encashment for five months, gratuity amount of Rs.6,959/- totalling a sum of Rs.14,249/-, which was to be adjusted against the rent of quarter allotted to the petitioner due to the corporation, as a result of order for recovery of Rs.18,259/- was made.

5. The petitioner has contended that since in the impugned order his date of superannuation is stated to be 13/12/1987, he must be deemed to be in service until 13/12/1987 and accordingly, he is entitled to the gratuity for the full period as well as pensionary benefits on that basis and the respondents have erred in not considering his claim. The respondents in their reply affidavit has pointed out that right from 1/10/1976, the petitioner has remained unauthorisedly absent from service and he never joined the service on transfer. The petitioner has admitted earlier before this Court that he started his practice from March 1985 vide letter dated 18/2/85. Thus the petitioner has never complied with the order of joining duty in parent department to work as tracer in the corporation and has all alone remained unauthorisedly absent from duty without any justification without even applying for leave.

6. In these proceedings, it was pointed that according to the general application of BCSRs, as the petitioner has remained unauthorisedly absent from 1/10/1976, the period thereafter cannot be counted for computing qualifying service, the petitioner does not warrant any benefits other than which are already given to the petitioner. This assertions in the reply affidavit has not been controverted. In view of the documents produced by the petitioner himself, by which the pensionary benefits were extended to the employees of the corporation, applicability of B.C.S.R. in general is not disputed. No separate rule governing retiral benefits was shown to exist for the corporation relevant to present controversy. The BCSR Rules governing the pensions are applicable to the case of the corporation and the petitioner's case is to be considered on that basis. For the purpose of computing entitlement to

pension, only uninterrupted qualifying services can be taken into consideration. Under Rule 250, the services of any incumbent is to be considered to be interrupted with effect from the date he was absent from duty, otherwise than, an authorised leave.

7. In the aforesaid facts and circumstances, there is no room to argue with any justification that since the petitioner has remained absent unauthorisedly from 1/10/1976, the day when he was ordered to be repatriated to the parent department on the post of tracer and the order which was challenged by the petitioner without success, until highest court of the land and he did not resume his duties inspite of there being no order staying the operation of the impugned order by the Court or for any other reason. The period of absence from duty since 1/10/76 cannot but be treated as absent on unauthorised leave. No application was ever made for grant of leave. Whether a man who is absent from duty is on leave or unauthorisedly absent is an existing state of affair and not a question of imposing penalty which needs any specific order. If a person remains absent from duty without availing any leave which he could avail, he is to be treated as unauthorisedly absent. No grievance was ever made out to regularise unauthorised absence from duty by the petitioner before any authority, notwithstanding the fact was brought on record and to the notice of petitioner in appeal before Supreme Court prior to 1991 and also before this Court in proceedings of Special Civil Application No.5193/93 in which the Division Bench on LPA found that the petitioner did not resume duty. There is also justification in the contention of the respondents that the petitioner having enrolled himself as an advocate in 1985, when being informed by the corporation in response to his application for 'No Objection Certificate' that he is entitled to enrol himself as an advocate by treating himself to have ceased to be in service of the corporation, the petitioner cannot be said to be in service any more after enrolment as an advocate.

8. The question still survives for consideration that, in the absence of any order of dismissal from service, merely on the basis of long absence from duty which may be treated as interruption in the continued service, if the petitioner is otherwise entitled for the completed period of service to any pension for that period.

9. From the aforesaid facts, it is clear on that basis that the petitioner can be said to have interrupted

service with effect from 1st October 1976. If that be so, in view of the directions by the Division Bench, the respondents were under an obligation to decide whether as on 1/10/1976, the petitioner had pensionable service to his credit and if so, to what reliefs, the petitioner was entitled to once they had accepted that he superannuated on completion of the age of superannuation in 1987 or at best on assuming that the petitioner has resigned from services in 1985 as the Division Bench has held that this matter to be considered by the employer on the basis of the claim made by the petitioner. From the impugned order, it appears that, apart from what has been granted to the petitioner, no reasons have been stated in that order to throw any light on how the respondents have considered the claim of the petitioner and the retiral benefits relating to pension and gratuity on the premise that period from 1/10/1976 be treated as absence from duty otherwise than an authorised leave, how the claim of service upto 1/10/76 has been treated.

10. In the circumstances, the petition is disposed of with the direction to the respondent corporation to decide the case of the petitioner on the claims made by him by making a speaking order, on the premise that the petitioner was absent unauthorisedly from service w.e.f. 1/10/76, how the period of service prior to that date is to be treated and retiral benefits, if any, can be granted for services upto that period and if so, the same may be paid within a period of three months from the receipt of writ. In the facts and circumstances of the case, there shall be no orders as to costs.

parmar*